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David Pyper v. Justin C. Bond, Dale M. Dorius, and Alison D. Bond : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

DAVID PYPER, Plaintiff/Appellee, vs. JUSTIN C. BOND, DALE M. DORIUS, and ALISON D. BOND, Defendants/Appellants.	**BRIEF OF APPELLEE** Case No. 20091025-SC

Appeal from the Utah Court of Appeals Case No. 20080906

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I. STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

The underlying case is a sheriff's sale/redemption dispute. Appellants J. Bond and Dorius are former attorneys for Appellee David Pyper ("Pyper") and obtained a judgment against Pyper for unpaid legal fees. J. Bond and Dorius (hereinafter, "the Attorneys") instituted a sheriff's sale of Pyper's real property. Upon completion of the sale, they transferred some of their interest in the real property to Appellant A. Bond (also an attorney). Pyper disputed the sale based on, among other things, gross inadequacy of the purchase price and irregularities by the Attorneys during the six-month redemption period.

This case was tried at a day-long hearing before Sixth District Court Judge David Mower on June 23, 2008. In his September 2, 2008 *Memorandum Decision (Including Findings of Fact and Conclusions of Law)* Judge Mower set aside the sheriff's sale. He signed and entered the final order in this case on October 16, 2008. The Attorneys appealed to the Utah Court of Appeals, which affirmed the Trial Court's decision in Pyper v. Bond, 2009 UT App 331. The Attorneys now appeal the Pyper decision.

B. Pyper's Response to the Attorneys' *Statement of the Facts*

The Attorneys inappropriately attempt to set forth a number of factual allegations in the *Statement of Facts* and *Argument* sections of their Brief of Appellants Their factual allegations are irrelevant and inapplicable because The Attorneys asserted no challenge before the Pyper court of the Trial Court's findings of fact (and, indeed, they

failed to marshal any evidence before the Pyper court that supported the Trial Court's findings of fact and conclusions of law). Accordingly, the Trial Court's findings of fact (set forth immediately below) govern over any facts asserted by the Attorneys.

C. Pyper's Statement of Material Facts

Because the Trial Court's findings of fact govern this appeal, Pyper restates the Trial Court's salient findings of fact from the *Memorandum Decision*:

1. Pyper incurred attorney's fees to J. Bond in the amount of $9,064.82, which Pyper failed to pay. (R. at 406, ¶¶ 3-4)
2. J. Bond filed an action to collect his attorney's fees, resulting in a March 1, 2006 judgment of $10,577.23 against Pyper. (R. at 407, ¶¶5-6)
3. J. Bond then obtained a Writ of Execution to collect on the judgment, and levied against real property owned by Pyper. (R. at 407, ¶¶7-8)
4. Pyper's real property is a 1,500 – 1,600 square foot house on a one-half acre lot valued in the range of $125,000 to $127,764. (R. at 407, ¶9)
5. A sheriff's sale occurred on November 9, 2006 whereat J. Bond was the only bidder. (R. at 407, ¶¶10-12)
6. J. Bond successfully bid $329, which was the only bid on the property. (R. at 407-408, ¶¶13-16)
7. J. Bond did not pay any cash for the property because the sale price of $329 was less than the $10,577.23 judgment. (R. at 408, ¶17)
8. At the time there were several liens on the property, which Pyper was

able to clear off in April 2007. (R. at 408, ¶19)

9. Even assuming there was still a $50,000 mortgage on the property, based on the $125,000 - $127,764 value of the property, there was $75,000 - $77,764 equity in the property, which J. Bond bought for $329. (R. at 413)

10. Pyper desired to redeem the property from the Sheriff's sale. (R. at 408, ¶20)

11. On April 20, 2007, Pyper called the Attorneys' law firm (Dorius, Bond, Reyes & Linares) asking for a judgment lien payoff. (R. at 408, ¶21)

12. Pyper was unable to speak with either of the Attorneys, but was told by their staff that the firm would call him back. (R. at 408, ¶22)

13. No one called Pyper back. However, on April 25, 2007 Pyper made another phone call to the law firm and spoke with Dorius about a payoff amount. (R. at 408, ¶23)

14. Although Dorius and Pyper have conflicting accounts of the April 25, 2007 conversation, Dorius told Pyper he needed to first talk to J. Bond about it. (R. at 408-409, ¶¶24-25)

15. Thereafter, Pyper called Dorius's office every day, making a total of approximately 28 phone calls. (R. at 409, ¶26)

16. Pyper explained that he called the law firm these many times in order to obtain a payoff amount because he did not know the exact amount, and

thought that some interest might have been added to the original amount. (R. at 411, ¶44)

17. On May 16, 2007, a Sheriff's Deed was issued transferring the property to Bond. (R. at 409, ¶27)

18. On May 17, 2007, Pyper called J. Bond and told him that Pyper had money to pay off the judgment. (R. at 409, ¶¶28-29)

19. J. Bond told Pyper that the Attorneys needed to get together and figure out the amount of the payoff, and that he would call Pyper back. (R. at 410, ¶¶30-32)

20. J. Bond never called Pyper back. (R. at 410, ¶33)

21. Pyper kept calling the Attorneys almost every day until May 30, 2007. (R. at 410, ¶36)

22. On May 30, 2007, Pyper called his attorney, Bryan Quesenberry, for help in obtaining the payoff amount. (R. at 410, ¶37)

23. That same day Quesenberry called Dorius to ask for a payoff amount. (R. at 410, ¶38)

24. Dorius told Quesenberry that Dorius would call him back by end of the week, but never called Quesenberry back. (R. at 411, ¶¶39-40)

II. SUMMARY OF ARGUMENT

The Attorneys' first argument seeking reversal of the Court of Appeals decision in Pyper v. Bond, 2009 UT App 331 is that the Pyper court incorrectly applied Utah caselaw when it interpreted the two-part test established in Young v. Schroeder, 37 P. 252 (1894)[1] and reaffirmed in Pender v. Dowse, 265 P.2d 644 (Utah 1954). This argument, however, misreads the Young decision, ignores the United States Supreme Court's affirmation of Young, and also misreads the Pyper court's review and application of Young.

The Attorneys' second argument on appeal is that Pyper supposedly creates unwise precedent. This argument, however, is premised on a convenient and selective ignorance of facts found by the Trial Court in favor of Pyper. Viewing Pyper in light of the compelling facts which the Trial Court and the Pyper court found shocking, both courts properly invoked their equitable discretion to extend the redemption period in favor of Pyper.

[1] A copy of Young is attached hereto as Appendix exhibit number 1.

III. ARGUMENT

The correct standard of review is abuse of discretion according to Huston v. Lewis, 818 P.2d 531 (Utah 1991). Huston is one of the three key cases related to this appeal, and is discussed below. In Huston, the court held that expanding the redemption period is discretionary:

> We have stated that in appropriate circumstances, a court may enlarge a redemption period under Utah Rule of Civil Procedure 6(2). Rule 6(2) provides. 'When by these rules . . . an act is required or allowed to be done at or within a specific time, the court for cause shown may at any time in its discretion . . . order the period enlarged . . . .' *Since rule 6(2) clearly grants the court discretion, we review the court's decision for an abuse of that discretion.* [footnote omitted]. Generally, *we will not find an abuse of discretion unless, given the applicable law and facts, the trial court's decision is unreasonable.* [footnote omitted]

Id. at 534 (emphasis added). See also, State in Interest of H., 610 P.2d 849, 852 (Utah 1980) (citation omitted) (holding, "In equity proceedings we are charged with the responsibility of reviewing the evidence; and it is the established rule that we will not disturb the findings and determination made unless they are clearly against the weight of the evidence, or the court has abused its discretion").

Summarizing this burden of proof on appeal, the Huston court explained that in order for the Attorneys "to succeed, they must show that the equities of the[] case are not so compelling that the trial judge acted unreasonably in . . . extending the period." Huston, 818 P.2d at 536.

A. THE PYPER COURT PROPERLY APPLIED YOUNG, PENDER AND OTHER RELEVANT CASELAW

Abandoning in their Brief of Appellants the certiorari argument that the Pyper

court erred in interpreted Young's two-part test in setting aside a sheriff's sale, the Attorneys focus their efforts on distinguishing Young and Pender from the present dispute by arguing that the Pyper court failed to properly apply these cases.

As set forth in Pyper, the test to be applied in the present case to equitably extend the redemption period is (1) whether there was such a gross inadequacy of price in the Attorneys' purchase of the Pyper Property that would shock the conscience, and (2) whether there were irregularities attending the sale (or redemption period). Pyper, 2009 UT App 331, ¶11 (citing Young, 37 P. at 254). Notably, the Attorneys did not attack the first part of this two-part test in their appeal to the Pyper court. (See, Brief of Appellants, Utah Court of Appeals, pgs. 10-17). Now, before the present Court, the Attorneys do not attack the Pyper court's recitation of this two-part test derived from Young. Instead, they Attorneys complain that the Pyper court misapplied certain conclusions or principals that the Pyper court derived from Young.

1. The Trial Court and Pyper Court Properly Concluded that the Facts of This Case Satisfy the First Part of the Young Test

To the extent the Attorneys argue the first part of the Young test (i.e. by claiming that there was no gross inadequacy of price), they are barred because of their failure to assert this argument in their underlying appeal to the Utah Court of Appeals. (See, Brief of Appellants at 10-17). Nor do the Attorneys actually address this first prong of the Young test in their Brief of Appellants in the present appeal. The Attorneys have thus implicitly conceded the first part of Young's two-part test. However, in case the

Attorneys attempt to resurrect this argument in their reply appeal brief, Pyper addresses it as follows.

Regarding the first part of the Young test (i.e. gross inadequacy of price), both the Trial Court and the Pyper court were appalled at the sacrifice of Pyper's property (which was conservatively valued at containing $75,000 in equity). Both courts found that when comparing the $75,000 windfall the Attorneys received for the paltry sheriff's sale price of $329,[2] such clearly shocked the conscience of an impartial mind and was a grossly inequitable sacrifice of Pyper's property (and after the sheriff's sale the Attorneys still had their $10,577.23 judgment against Pyper!)[3]. The Attorneys' $329 sheriff's sale purchase price was 0.44% of the $75,000 value of Pyper's property. By comparison, the creditor in Young obtained a $1,673.36 default judgment against the debtor, and then executed on the debtor's real property, which was valued at $25,000. Young, 37 P. at 252. The Young sheriff sale purchase price translates into 6.7% of the value of the debtor's property. In reviewing these facts, the Young court held:

> wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, *this inadequacy furnishes a strong, and, in general, a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, weakness, or the distress or necessity of the vendor*; and this imposes on the purchaser a

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[2] This $75,000 value would have been the value at the time of the sheriff's sale, but six months later when the sheriff's deed was issued, the value of Pyper's property was $125,000 because Pyper had removed, among other things, a $50,000 bank lien.

[3] It is critical to note that the Trial Court never dissolved the Attorneys' judgment or their judgment lien on Pyper's property. The Attorneys still maintain their judgment and their ability to re-schedule a new sheriff's sale if the Pyper decision is affirmed.

> necessity to remove this violent presumption by the clearest evidence of fairness of his conduct.

Id. at 254 (emphasis added). Whether viewing the 0.44% purchase-to-value in the present case by itself, or whether viewing it juxtaposed to the 6.7% purchase-to-value of Young, the Attorneys in the present case clearly obtained Pyper's property for a song. It is thus no wonder the Trial Court and the Pyper court found the sheriff sale purchase price in the present case constituted a gross inadequacy of price that shocked the conscience of a reasonable person, which is the first part of the Young test.

The Pyper court even noted, correctly, that this conclusion (regarding the first prong of the Young test) could alone form the basis (without further considering the second prong of the Young test) for equitably extending the redemption period. Pyper, 2009 UT App 331, ¶12 n 5 (citing Young, 37 P. at 254 ("If the inadequacy is so gross as at once to shock the conscience of all fair and impartial minds, if the sacrifice is such that every honest man would hesitate to take advantage of it, it may well be doubted whether every such case would be beyond the power of a court of equity to relieve against")).

2. The Trial Court and Pyper Court Properly Concluded that the Facts of This Case Satisfy the Second Part of the Young Test

In the context of the second part of the Young test (irregularities attending the sale, or slight circumstances when the purchaser is an attorney), the Attorneys spend considerable time in their Brief of Appellants arguing that the Pyper court misapplied the facts of Young. The Attorneys are in error. The Pyper court correctly affirmed the Trial Court's conclusion that the Attorneys' conduct during the six-month redemption period,

and the fact that the Attorneys are lawyers, amounted to slight circumstances attending the sale, and thus allowed Pyper to satisfy the second part of Young's two-part test.

~~(a).~~ In Both Young and Pyper, Lawyers that Participated in the Sheriff's Sales Were the Same Lawyers that Purchased the Debtors' Property Sold at the Sheriff's Sales

In Young the creditor's lawyers, who attached and levied on the debtor's property, were the same lawyers who purchased the debtor's property at the sheriff's sale. Young, 27 P. at 255. The same occurred in the sheriff's sale at issue in the present appeal. The Attorneys scheduled the sheriff's sale, caused it to be published, and one of them attended and, being the only bidder, successfully credit-bid a fraction ($329) of the total $10,577.23 judgment against Pyper to obtain Pyper's property at the sheriff's sale. (See, Pyper's Statement o Material Facts, *supra*, ¶¶3, 5-6).

The Young court explained that because the creditors' attorneys participated in and purchased the debtor's property from the sheriff's sale, their conduct required special scrutiny. Id. at 254 ("an additional feature of the transaction is that Stephens & Schroeder were members of the bar, attorneys for the judgment creditors, who thus, under the forms of law and the processes of the court, sought to enrich themselves without any consideration for the rights of the judgment debtor . . ."). The Young court viewed the creditors' participation in the purchase of the debtor's property at the sheriff's sale with stern disapproval:

> A purchase by an attorney for his own benefit at a sale over which he has exercised any direction or control should always be closely scrutinized by the court. [Citation omitted]. 'Public policy and the analogies of the law require that

> they should be considered per se as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, *upon slight additional facts*.' [Citation omitted]

Id. at 255-56 (emphasis added). In Schroeder v. Young, 161 U.S. 334, (1896),[4] the subsequent United States Supreme Court decision that affirmed Young, the United States Supreme Court specifically addressed this attorney-as-purchaser situation:

> Although there is no general rule that an attorney may not purchase at an execution sale, provided it be not done to the prejudice of his own clients, [citation omitted] *such purchase in itself is calculated to throw a doubt upon the fairness of the sale, and as is quaintly said of such sales by the Court of Appeals of Kentucky in Howell v. McCreery, 7 Dana, 388: 'Public policy and the analogies of law require that they should be considered per se as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts*.' [Citations omitted]

Id. at 340 (emphasis added). The Pyper court followed Young in acknowledging this exact same attorney-as-purchaser situation existed in the present dispute, and thus justified requiring only slight irregularities. Pyper, 2009 UT App 331, ¶¶12, 16-17, 20. In so holding, the Pyper court clearly and correctly followed Utah and United States Supreme Court precedent.

(b). In Both Young and Pyper, Lawyers Who Participated in the Sheriff's Sales and then Purchased the Creditors' Properties Misled the Creditors During the Subsequent Six-Month Redemption Period

Another striking similarity between Young and Pyper again involves the lawyers participating in the sheriff's sales. In Young, lawyers for the creditors misled and made misrepresentations to the debtors after the actual sheriff sales (there were three) by telling

[4] A copy of Schroeder is attached in the Appendix as exhibit number 2.

the creditor they would not enforce the six-month statutory redemption period:

> after said several sales had been made, and before the time for redemption had expired, [attorney] Stephens informed the plaintiff that the statutory time for redemption would not be insisted upon . . .

Young, 37 P. at 253. Relying thereon, the debtor in Young allowed the redemption period to expire. Id.

In the present case Pyper called the Attorneys (J. Bond and Dorius – J. Bond set up the sheriff's sale and was the buyer at the sheriff's sale; Dorius was his law partner at the time) approximately 28 times by phone during the redemption period, asking for a payoff on the judgment. Rather than scorn Pyper, tell him to stop calling, tell him to find his own attorney, or tell him no such payoff would be forthcoming, the Attorneys instead strung Pyper along by telling him they would call him back with a payoff number. Pyper relied on their promises, and the knowledge that they were attorneys bound by ethical obligations,[5] and so waited for their return call. He did not receive the return call, and so peppered their law office with many phone calls.

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[5] The Pyper court noted, "As Pyper's former counsel, [the Attorneys] had some obligation not to take advantage of Pyper's known ignorance." Pyper, 2009 UT App 331 at ¶17 (footnote omitted) (citing Kilpatrick v. Wiley, Rein & Fielding, 2001 UT 107. ¶¶52-53 (discussing continuing nature of attorney's duties of confidentiality and loyalty after termination of attorney-client relationship)); see also, Utah Rules of Professional Conduct 4.3(a) ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."); Rule 14-301 of the Standards of Professionalism and Civility, Preamble ("Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system."): Rule 14-301(6) of the Standards of Professionalism and Civility ("Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.")

Pyper's experience with the Attorneys' poor communications and unfulfilled promises was not his alone. His attorney had the same phone call with Dorius, received the same promise of a return call with a payoff amount, and received the same response accorded to Pyper – no return call. As a result, the Attorneys' misrepresentations caused Pyper to wait just long enough for the six-month redemption period to expire. Both the Trial Court and Pyper court found that these facts amounted to circumstances sufficient to satisfy the second part of the Young test.

In sum, the present case tracks along Young in three critical areas: (1) the present case, even more than Young, consisted of an appalling sacrifice of the debtor's property which is evident when comparing the value of the debtor's property sold at the sheriff's sale to the price paid for said property, (2) lawyers were heavily involved in the conduct of the sheriff's sales and subsequent redemption period, and in fact, purchased the debtor's property at said sales, and (3) the lawyers involved in the purchase of the debtor's property at said sales subsequently mislead the debtor during the six-month redemption period such that said period expired to the detriment of the debtor.[6]

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[6] Interestingly, in discussing Young in detail, the court in Huston v. Lewis, 818 P.2d 531, 535-6 (Utah 1991) cited these three key facts in reaffirming Young:

> [1] Land worth $26,000 was sold to satisfy a judgment of $1,700, [2] the purchasers were the attorneys for the judgment debtor, [3] the purchasers directed the land to be sold in parcels in a manner that prevented the land from being sold at a fair price, and [4] the purchasers assured the debtor that they would not insist on the statutory period for redemption.

Id. at 536 (citing Young, 37 P. at 254-56).

3. The Attorneys' Criticism of the Pyper Court's Reliance on Pender is Misplaced

In their Brief of Appellants, the Attorneys take umbrage with the Pyper court's reliance on Pender (see, Pyper, 2009 UT App 331 at ¶15). arguing that, "In Pender, the debtor was deliberately misled by the purchaser." (See, Brief of Appellant at 13). The Attorneys further complain about the two additional factors cited in ¶15 of the Pyper decision, stating, "Both of these [factors] in Pender are again affirmative actions by the purchaser that directly influenced the sale and impeded the redemption process." Id. The Attorneys misapprehend the Pyper court's reliance on Pender.

The Pyper court relied on Pender to support the conclusion that the "irregularities attending the sale" include *any irregularities that occur during the redemption period.* In fact, such redemption-period irregularities occurred in Pender when the creditor and his attorney exhibited "studious silence" about their intent to collect the judgment despite repeated contact with the debtor and his attorney both before and after the execution sale. Pender, 265 P.2d at 648. This conduct was not an "affirmative action[]" of the creditor, as the Attorneys claim. Nor does it show that the creditor deliberately misled the debtor, as asserted by the Attorneys. It is passive conduct – i.e. "studious silence." Contrast the "studious silence" of the creditor and his attorneys in Pender with the not-so-silent Attorneys in the present case who (personally or through staff) affirmatively told Pyper they would call him back and get him a payoff figure. The affirmative misrepresentations in the present case clearly go above and beyond Pender's "studious

silence," where that court affirmed the trial court's conclusion that the sale at issue there "was attended by unfairness and was tainted with fraud." Id. at 648.

Similar to the redemption-period irregularities noted above in Pender and Young, such irregularities can also be found in one of the three main cases cited and quoted by the Young court. In Graffam v. Burgess, 117 U.S. 180, 182 (1886), after the actual sheriff's sale, the judgment-creditor Graffam "and the other defendants meanwhile conspired together to keep [the debtor] in ignorance of the [sheriff's] sale until the year, allowed by the statutes of Massachusetts for redeeming the property, had expired." Thus, Graffam, Pender and Young all considered redemption-period irregularities in deciding whether to equitably extend the redemption period.[7]

4. The Trial Court and Pyper Court Decisions Comport with Huston

The Attorneys argue that in affirming the Trial Court's ruling in favor of Pyper, the Pyper court failed to follow Huston, *supra*. Specifically, the Attorneys claim that the controlling test is based on Huston and requires the following two factors: the finding of exceptional circumstances as well as compelling equities. (See, Brief of Appellants at

[7] Although the Attorneys are loathe to expand the reach of equity, but quick to restrict it, Utah caselaw views equity differently. Equity is defined as "fairness" or the "body of principles constituting what is fair and right." Black's Law Dictionary 443 (7th ed. 2000). "The purpose of an equity action is to restore the parties to the status quo to the extent possible." Horton v. Horton, 695 P.2d 102, 107 (Utah 1984). "It is inherent in the nature and purpose of equity that it will grant relief only when fairness and good conscience so demand. Jacobson v. Jacobson, 557 P.2d 156, 158 (Utah 1976). Another purpose of equity "is the prevention of injustice . . ." Valley Bank & Trust Co. v. Rite Way Concrete Forming, 742 P.2d 105, 108 (Utah 1987).

15). Apparently, jettisoning the two-part Young test (which the Attorneys asserted in their Brief of Appellants to the Pyper court below),[8] the Attorneys prefer another two-part test containing seemingly different verbiage.

First, the Attorneys misstate Huston. After reviewing Young, Mollerup v. Storage Systems International, 569 P.2d 1122 (Utah 1977), and the applicable legal principles therein, the Huston court concluded, "a court should take such an action only when the equities of the case are compelling and 'move the conscience of the court.'" Huston, 818 P.2d at 535.

Second, the antecedent source of the legal principles in Huston is Young. See, e.g., Young 37 P. at 254 ("If the inadequacy is so gross as at once to shock the conscience of all fair and impartial minds . . ."). Thus, these Huston principles are essentially synonymous with the Young two-part test.

Third, the Trial Court concluded that the inadequacy of purchase price "shocks the conscience of an impartial mind." (See, Memorandum Decision at 8). Regarding this conclusion, the Pyper court stated, "We do not disagree with the district court's determinations that the sale of Pyper's $75,000 of equity in the property for $329 . . . 'shocks the conscience of an impartial mind' . . ." Pyper, 2009 UT App 331 at ¶12 n 5. Thus, both courts below considered and used these Huston legal principles.

Further, it is self evident that both the Trial Court and Pyper court felt the equities of the present case were compelling enough and provided exceptional circumstances

[8] See, the Attorneys' Brief of Appellant submitted to the Pyper court at 11-12.

sufficient to extend the redemption period. The dissenting judge in Pyper, Judge Davis, clearly indicated so in the opening paragraph of his dissent. Id. at ¶22. For the Attorneys to ignore the Young two-part test and then argue that the Pyper court erred in not expressly stating that the equities of this case were compelling and shocked the conscience of the court is to turn this dispute into a battle of semantics.

The Pyper decision thus comports with the equitable principles enumerated in Huston relating to equitably extending the redemption period.

B. THE PYPER DECISION ESTABLISHES PRUDENT PRECEDENT

The Attorneys' concluding argument is that Pyper establishes bad precedent. The Attorneys, however, support this allegation with conclusory statements and a concerted effort to conveniently turn a blind eye to the facts. Truly, facts are stubborn things for the Attorneys.

The Attorneys' doomsday claims of unwise precedent can be summarized as: (1) a sheriff's sale can now be attacked at any time after the end of the redemption period by merely alleging even the slimmest instances of unfairness, (2) debtors now need do nothing but sit idly by for 90% of the redemption period and then allege he or she made several unreturned phone calls, and (3) even if a purchaser makes no affirmative actions or representations during the redemption process the sale can still be attacked by merely alleging the debtor made a few unreturned phone calls. (See, Brief of Appellants at 16).

These allegations of unwise precedent completely (and conveniently) ignore the shocking sacrifice the Attorneys seek of Pyper's property – a property valued at $125,000

(when the liens were all removed) – for a paltry $329, and which still left the Attorneys with their $10,577.23 judgment (less the $329 credit bid). No case cited by either side in this dispute even comes close to providing a greater sacrifice of a debtor's property than the present sacrifice sought by the Attorneys. The Attorneys clearly ignore this fact in arguing 'unwise precedent.'

The Attorneys also ignore the fact that they and their staff affirmatively told Pyper more than once on the telephone that they would get back to him with a payoff. The Attorneys amazingly overlook this fact, and instead claim Pyper is simply relying on unreturned phone calls, and that the Attorneys and their staff made no affirmative representations to Pyper during the redemption period regarding a payoff. which he relied on. The Attorneys, of course, dispute this claiming that they and their staff never made such representations. However, the Trial Court, as trier of fact, was on hand to observe testimony from the parties and clearly weighed this disputed testimony in favor of Pyper. (See, Memorandum Decision, Findings of Fact ¶¶21-26, 44, and p. 8). The precedent created by this critical fact (i.e. attorney purchasers at a sheriff sale misleading the debtor during the redemption period) was established long ago with Young and Pender. Pyper produces no new precedent on this point.

The Attorneys also ignore the undisputed fact that they are just that – attorneys. They also previously represented Pyper. The line of cases demanding a thorough review of lawyer conduct in similar cases started well before Pyper was decided. If such a fact creates unwise precedent, then the whole line of cases beginning with Young needs to be

overturned.

Further, the claim that Pyper sat idly by as the six month redemption period transpired is a myth. Pyper testified at trial that during the redemption period he had to clear title to his property in order to obtain a loan against his property that could pay off the Attorneys' judgment, and that he cleared four or five different liens during the redemption period. (R. at 450, p. 90).[9] One such encumbrance on title was a "large bank lien" which Pyper was able to reconvey, thereby completely clearing title to his property except for the Attorneys' judgment lien. (R. at 450, p. 90-91). Pyper also helped his son qualify for the bank loan that would be used, in part, to pay the Attorneys' judgment, and which would be recorded against Pyper's property. (R. at 450, p. 94, 116). In addition to clearing title, Pyper called the Attorneys some 28 times to obtain a payoff. Thus, Pyper remained quite busy during the redemption period, contrary to the claims of the Attorneys and Judge Davis.

Finally, at the end of the Brief of Appellants, the Attorneys cite Mollerup v. Storage Systems International, 569 P.2d 1122 (Utah 1977) for its use of "substantial" to modify the "irregularities" needed to upset a sheriff's sale. Id. at 1124. Although Mollerup cites generally to Young for this conclusion, Young referenced the adjective "substantial" just once. After the Young court stating its holding,[10] it applied the holding

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[9] Copies of these trial transcript excerpts are included in the Appendix as exhibit number 3.

[10] Young's holding is, "All the cases unite in the doctrine that on gross inadequacy of

to the specific facts before it: "This is not a case which rests on mere inadequacy of price alone, but one where the sales complained of were attended by such *substantial* irregularities as must have prevented a sale at a fair sum." Young, 37 P. at 254 (emphasis added). This reference in Young to the adjective "substantial" does not modify Young's holding. Instead, this adjective merely characterizes the facts before the Young court and indicates that such facts meet and exceed the second part of the two-part Young test, which requires only that "irregularities" attend the sale.

This interpretation of Young's use of the adjective "substantial" is confirmed in Schroeder, *supra*, where the United States Supreme Court affirmed Young. In Schroeder, the court held: "*the general proposition* laid down, as above stated, that if, [1] in addition to inadequacy of price [2] there be other circumstances throwing a shadow upon the fairness of the transaction. the judgment debtor will be allowed to redeem." Schroeder, 161 U.S. at 339-340 (emphasis and numbers added). Interestingly, in analyzing and re-stating Young's holding, the Schroeder court completely omitted the adjective "substantial." Instead, "slight" was the only adjective Schroeder used to modify "irregularities." Id. at 340 (citations omitted). This use of "slight" by Schroeder was in the case where a creditor's lawyer was the purchaser at the sheriff's sale (id. at 340), the same situation in the present appeal.

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price, coupled with irregularities attending the sale . . . it is the duty of the courts to set the sale aside . . ." Young, 37 P. at 254 (citations omitted).

IV. CONCLUSION

Based on the foregoing, this Court should affirm the Court of Appeals' decision in Pyper.

RESPECTFULLY SUBMITTED this 10th day of May, 2010.

HILL, JOHNSON & SCHMUTZ, L.C.

J. Bryan Quesenberry
Counsel for Plaintiff/Appellee

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 10th day of May 2010, they caused a true and correct copy of the foregoing Brief of Appellee to be delivered to the following:

Jennifer Reyes
Dorius & Reyes
29 S. Main Street
Brigham City, UT 84302

Sent Via:
_____ Hand-Delivery
_____ Facsimile
_____ Mailed (postage prepaid)

V. APPENDIX

1. Young v. Schroeder, 37 P. 252 (Utah 1894)

2. Schroeder v. Young, 161 U.S. 334 (1896)

3. Trial Transcript Excerpts

Exhibit 1

Positive
As of: May 10, 2010

JOHN M. YOUNG, RESPONDENT, v. A. T. SCHROEDER AND WIFE, APPELLANTS. [1]

1 Appealed to the Supreme court of the United States, July 31, 1894.

No. 437.

SUPREME COURT OF UTAH

10 Utah 155; *37 P. 252*; *1894 Utah LEXIS 23*

June 4, 1894, Decided

PRIOR HISTORY: [***1] APPEAL from the district court of the third judicial district, Hon. G. W. Bartch, Judge.

Action by John M. Young against A. T. Schroeder and wife to obtain a decree adjudging certain deeds, executed by the U.S. marshal pursuant to certain execution sales, to be fraudulent, and that the plaintiff be permitted to redeem from such sales, notwithstanding the statutory time for redemption had expired, and that the defendants be required to convey to him the property mentioned and described in said deeds. From a decree for plaintiff, defendants appeal.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff debtor filed suit against defendant attorneys to obtain a decree adjudging certain deeds to be fraudulent and an order that the debtor be permitted to redeem the property and that the attorneys be required to convey the property to him. The District Court, Third Judicial District (Utah), entered a decree for the debtor. The attorneys appealed.

OVERVIEW: A corporation obtained a default judgment against the debtor in the amount of about $ 1,600. The attorneys represented the corporation in that suit. The debtor and his sister obtained property as tenants in common. The property was worth $ 25,000. An execution was later issued to a U.S. marshal, directing him to levy on sufficient personal property to satisfy the judgment. The marshal attached and levied on all the debtor's property after being unable to find personal property. The attorneys purchased two lots for themselves at the execution sales. The attorneys told the debtor that the statutory time for redemption would not be insisted upon. As a result, the debtor allowed the period for redemption to lapse. Before bringing suit, the debtor offered to pay the attorneys the full amount of the corporation's judgment against him, but they refused. On appeal, the court held that the district court properly awarded the debtor relief because not only was there a gross inadequacy of price, the record showed that the attorneys, who became purchasers, so directed and controlled the officer charged with the duty of executing the writ as to lead to a sacrifice of the debtor's property.

OUTCOME: The court affirmed the district court's decree.

CORE TERMS: feet, parcel, marshal, irregularity, thence, levy, redemption, purchaser, levied, thence north, inadequacy, sacrifice, partition, thence east, plat, judgment debtor, cotenant, deed, inadequacy of price, ex-

pired, decree, corner, block, judgment creditor, fair price, execution sales, attended, insisted, redeem, notice

LexisNexis(R) Headnotes

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Evidence > Inferences & Presumptions > Presumptions
Evidence > Inferences & Presumptions > Rebuttal of Presumptions
[HN1] Whenever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and, in general, a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, weakness, or the distress or necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of fairness of his conduct.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
[HN2] If the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or party interested has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.

Civil Procedure > Equity > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Laches
Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
[HN3] On gross inadequacy of price, coupled with irregularities attending the sale, especially where such irregularities are not merely formal and technical, but such as have a direct tendency to prevent the realizing of a fair price for the property sold, and are attributable to the purchaser at the sale, it is the duty of the courts to set the sale aside, unless the complaining party is estopped by his own laches.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
Real Property Law > Deeds > Enforceability
Real Property Law > Estates > Concurrent Ownership > General Overview
[HN4] The purchase of the grantor's interest in a specified parcel is, in effect, a wager that such parcel will be set off to him on partition, or otherwise confirmed to him by the other cotenants. Still, if such circumstances exist that the grantor sees fit to make, and the grantee to accept, a conveyance which may, in the event of an unfavorable partition, convey nothing, there is no valid reason for denying the utmost effect to the deed which it can be given, consistently with the rights of the other cotenants. But in the case of an involuntary transfer of property, the interest of the person whose estate is to be divested by compulsion ought to be carefully considered and jealously guarded. If an officer may lawfully levy on a specific parcel and subject it to forced sale, he may thereby sacrifice the property of the defendant, for few persons would be found willing to bid for that which, when purchased, consisted of a mere contingent interest, an interest which the other cotenants were not bound to notice, and which might be finally lost upon a partition of the common property. Hence the rule is that the levy and sale of the debtor's interest in a specific part of the lands cannot be sustained.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Legal Ethics > Client Relations > Conflicts of Interest
[HN5] A purchase by an attorney for his own benefit at a sale over which he has exercised any direction or control should always be closely scrutinized by the court. Public policy and the analogies of the law require that they should be considered per se as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts.

HEADNOTES

1. EXECUTION SALE.--IRREGULARITIES.--EQUITABLE RELIEF.--ESTOPPEL IN PAIS.--SEMBLE.--When land worth $ 26,000, is sold in separate parcels to satisfy a judgment of $ 1,700, and the purchasers at all the execution sales except one are the attorneys of the judgment creditor, and that to the extent of furnishing the officer with descriptions of the property to be levied upon and sold, they directed and controlled the processes of the court and directed and required the officer to levy upon and sell the property in such parcels as

rendered it impossible to realize at the sale a fair price, but led to a sacrifice of the debtor's property, such sales will be set aside and the judgment debtor allowed to redeem on an equitable basis even after the statutory time for redemption has expired, especially when the sales were attended with many and serious irregularities for which the parties claiming through the sales were responsible, and when one of the attorneys of the judgment creditor assured the judgment debtor that the statutory period of redemption would not be insisted upon, who relied upon this assurance and allowed the period of redemption to elapse. *Semble*, that the conduct of one member of a firm or copartnership not a party to the suit, about a matter not within the general scope of the partnership business, sufficient to create an estoppel against him, operates so as to bind another member of the firm sought to be charged, who had no knowledge of and did not participate in the acts creating the estoppel.

2. ID.--ID.--GROSS INADEQUACY OF PRICE.--LACHES.--Courts will set aside execution sales when it appears that the price obtained was grossly inadequate, and that the sales were coupled with irregularities, not merely formal and technical, but such as have a direct tendency to prevent the realizing of a fair price for the property sold, when such irregularities are attributable to the purchasers at the sales, unless the complaining party is estopped by his own laches.

3. ID.--ID.--EXCESSIVE LEVY.--VOID SALE.--Where an execution was issued and the officer levied it upon and sold certain property of the judgment debtor and returned it into court unsatisfied to the amount of $ 136, and another execution was issued which the officer levied upon certain other property of the judgment debtor, which he afterwards sold to satisfy the alleged balance of $ 136, and after deducting his fees, expenses and commissions therefrom amounting to $ 30, paid the balance, $ 106, to the attorneys of the judgment creditor, when in fact, there was only $ 25.57 due at the time of issuing the last execution. *Held*, that this was not an irregularity, merely such as would render the sale voidable, but the levy and sale being excessive, the sale was absolutely void.

COUNSEL: Messrs. Rawlins & Critchlow and Messrs. Jones & Schroeder, for appellants.

The court erred in permitting plaintiff to testify about a conversation had with Stephens relative to the redemption of the property. Stephens is not a party to the suit, and it related to a matter foreign to the scope of the partnership business. At the time plaintiff did not know that either Stephens or Schroeder had any interest in or control over the property. *Jackson v. Bartless, 8 Johns. 381*; *4 L. Ed. 57*; *Anderson v. Tompkins, 1 Fed. Cas. 851*, No. 365. The mere relation of joint ownership of property is not enough to constitute each owner [***2] the agent of the other to bind him by fraud. 1 Bige. on Fraud, 223. Plaintiff and his cotenants had divided the land into distinct lots, and a conveyance of all plaintiff's interest in any one lot is valid and effectual against his cotenants. Freeman on Coten. 282, § 208; *Butler v. Roys, 25 Mich. 53*; S. C. 12 Am. Rep. 218; *Jackson v. Newton, 18 Johns. 355*.

The court found that at the date of the first sale, Stephens did not know of the existence of any other property, and then in another finding that he had formed an intention to exhaust all of plaintiff's property. Inconsistent findings will not sustain a judgment. *Reese v. Corcoran, 52 Cal. 495*; *Manley v. Howlet, 55 Cal. 94*; *Harris v. Harris, 59 Cal. 116*; *Kloss v. Alleman, 64 Cal. 87*. There were three separate sales under two different executions. The court cannot grant entire relief in one action unless there was a common fraudulent intent as to all. Finding 10 makes such intent impossible. 2 Comp. Laws, § 3220; Wallen v. Ruskan, 12 How. Pr. 28; *Henderson v. Jackson, 40 How. Pr. 168*. As long as a judicial sale stands, the purchase price as between the parties is a conclusive test of its value. *Snyder v. Blair, 33 N. J. Eq.* [***3] *208*. Where there is a conflict of evidence on material issues, the finding of the court is not conclusive on appeal, like the verdict of a jury or the finding of a common law court, and the supreme court will review the facts as well as the law. *Kelley v. Carker, 55 Ark. 112*; S. C. 17 S. W. R. 706; *Cheney v. Roodhouse, 135 Ills. 25*; *Droster v. Mueller, 103 Mo. 624*; *U. S. v. Old Settlers, 148 U.S. 427*; *37 L. Ed. 587*. Fraud on the part of the purchaser must be shown, in addition to inadequacy of consideration. *Simmons v. Vandegrift, 1 N. J. Eq. 55*. There must be fraud to give a court of equity jurisdiction. Irregularity is not sufficient. Cavanaugh v. Jakeway, Walker Ch. 344; Hansford v. Barber, 3 A. K. Smith, 515. Some knowledge and participation in the act claimed to be fraudulent must be proved upon the party sought to be charged. The mere relationship of joint ownership to the property is not enough to constitute each owner the agent of the other to bind him by false representations in an unauthorized sale of the whole property. Bige. on Fraud, 223; *Holmes v. Wood, 32 Ind. 201*; *Arthur v. Griswold, 55 N. Y. 400*; *Perry v. Hale, 143 Mass. 540*; *S. C. 10 N. E. 174*.

The court nowhere [***4] finds that the defendant is guilty of actual fraud, and a failure so to find is equivalent to a finding against the plaintiff. Elliot App. Proc. § 757; *Young v. Berger, 32 N. E. 318*. Even where the price paid is inadequate, in order to avoid the sale, it must be shown that the purchaser is in some measure responsible for it. White v. Wilson, 14 Ves. Jr. 151; *Graffam v. Burgess, 117 U.S. 180*; Russel v. Pew, 31 P.

R 77, *Hudgens v Morrow, 47 Ark 515* The plaintiff the judgment debtor, knew of the execution sales and could have directed the officer, and having failed to do so cannot now complain of his own negligence 2 Comp Laws, § 3436, Jones v Townsend (Tenn), 5 Cen Law J 202 Where there is time for redemption allowed by law, the judgment debtor must redeem or make a motion to have the sale set aside before the time of redemption expires *Powers v Larabee, 57 N W 791*, and cases Jones v Townsend (Tenn), 5 Cent Law J 202, *Coolbaugh v Roemer 32 Minn 445*, *Jenkins v Merriweather, 109 Ill 647*, Stewart v Marshal, 4 G Green (Ia), 75, *State Bank v Noland, 13 Ark 299 Love v Cherry, 24 Ia 210*, *Chambers v Stone 9 Ala 260*, *Abercrombie v Conner, 10 Ala 292*, 2 [***5] Freeman on Exec § 306, p 1039, *Fletcher v McGill 110 Ind 406*, *Rigney v Small, 60 Ill 416*, *Johnson v Murray, 112 Ind 154*, *Richey v Merritt, 108 Ind 347, 9 N E 368*, *Levan v Milholland, 114 Pa St 49*

In order to create an estoppel in pais, the representation must relate to a present or a past state of things Langton v Doud, 10 Allen, 433, *Jackson v Allen, 120 Mass 79*, *White v Ashton, 51 N Y 280* An estoppel from the representation of a party can seldom arise, except where the representations relate to a fact, to a present or past state of things *Union Life Ins Co v Mowry, 96 U S 549, 24 L Ed 676* The party estopped must have intended that his misrepresentations should be acted upon by the party who asserts the estoppel *Zuchtman v Roberts, 109 Mass 53* An attorney may purchase at an execution sale subject to the right of his client to claim the benefit thereof *Smith v Black 115 U S 308, 29 L Ed 398*, *Allen v Gillett, 127 U S 589, 32 L Ed 271*, *Mining Co v Mason, 145 U S 340, 36 L Ed 736* A levy upon part of a tract held as tenant in common is good as against judgment debtor The only persons who can complain are his cotenants *Gregory* [***6] *v Tozier, 24 Me 308*, *Goodwin v Gregg, 28 Me 188*, Varnum v Abbott, 7 Am Dec 87 In case the officer, after offering the property separately, sells en masse, such a sale is good *Hill v F M N B , 97 U S 450*, *Van Valkenberg v Trustees, 66 Ill 103*, *Mugge v Ginger, 59 Ind 195*

Mr W H Dickson and Messrs Williams, Van Cott & Sutherland, for respondents

JUDGES: MERRITT, C J MINER and SMITH, JJ , concur

OPINION BY: MERRITT

OPINION

[*160] [**252] MERRITT, C J

This action was brought to obtain a decree of the court adjudging certain deeds (mentioned in the complaint, and executed by the United States marshal of Utah territory pursuant to certain execution sales made under a judgment obtained in the third district court by Clark Eldredge & Co , a corporation, against John M Young, the plaintiff, and others) to be fraudulent, and that the plaintiff be permitted to redeem from such sales, notwithstanding the statutory time for redemption had expired, and that defendants be required to convey to him the property mentioned and described in said deeds and complaint This relief was sought on the ground of gross inadequacy of the price obtained at such sales coupled with [***7] a great number of irregularities attending the sales, which led to the sacrifice of plaintiff's property The alleged irregularities are specifically set forth in the complaint, and also in the findings of the court below Upon the filing of the complaint the defendants Frank B Stephens and wife [*161] made a satisfactory settlement with the plaintiff, and in pursuance thereof conveyed to him all their interests in the property in controversy, and the suit as to these defendants was thereupon dismissed After that the defendants Schroeder and wife filed their answer, and a trial was had, which resulted in a judgment and decree in favor of plaintiff substantially as prayed for in the complaint, from which decree, and the order denying a new trial, this appeal is prosecuted

The findings of fact made by the court below are very full We have carefully examined the record, and are satisfied that they are fully sustained by the evidence From these findings it appears that on the 9th of February, 1891, Clark, Eldredge & Co , a corporation, commenced an action against John M Young (the plaintiff herein), Henry Goddard, and George Goddard to recover $ 1,640 61, with interest from [***8] January 3, 1891 That afterwards a judgment by default was entered against the plaintiff (John M Young) on March 6, 1891, for $ 1,673 36, and costs amounting to $ 30 50, said judgment bearing interest at 1 per cent per month That Frank B Stephens and A T Schroeder, partners, were the attorneys for Clark, Eldredge & Co in said action, that the plaintiff, John M Young, and his sister, Lydia Y Merrill, were the owners in fee, as tenants in common, of all of that part of lot 2, block 70, Plat A, Salt Lake City survey, commencing 64 1/2 feet west from the northeast corner of said lot 2, thence west 61 1/2 feet, thence south 20 rods, thence east 94 1/2 feet, thence north 90 3/4 feet, thence east 31 1/2 feet, thence north 41 1/4 feet, thence west 16 1/2 feet, thence north 148 1/2 feet, thence west 48 feet, thence north 49 1/2 feet, to the place of beginning, and also lot 12 in block 8, Five-Acre Plat A, Big Field survey, in Salt Lake county, Utah That the title of the plaintiff and Lydia Y Merrill in each of said properties [*162] was derived from the last will and testament

of John Young, deceased, father of said John M. Young and Lydia Y. Merrill, and was subject to a right [***9] in Sarah Milton Young and Ann Olive Young to receive each one-fourth of the income arising from said properties during their respective lives. That the plaintiff's interest in said portion of lot 2 at the times of the sales hereinafter mentioned was worth at least the sum of $ 25,000, and his interest in said lot 12 was worth at least $ 1,000. (There is an alley extending from north to south practically through the center of said portion of said lot 2.) That on the 29th day of April, 1891, an execution was issued in said action of Clark, Eldredge & Co. to the United States marshal, directing him to levy on sufficient personal property to satisfy said judgment, and, if sufficient personal property could not be found, then to levy on the real estate belonging to the defendants in said action; and the marshal, being unable to find any personal property out of which to satisfy said judgment, did, on May 7, 1891, give notice that he attached and levied on [**253] all the right, title, claim, and interest of said plaintiff and his codefendants in said action in and to that certain parcel of land described as beginning 101 feet north and 39 1/2 feet east of the south-west corner of lot [***10] 2, block 70, Plat A, Salt Lake City survey, running thence east 15 1/2 feet, thence north 28 feet, thence west 15 1/2 feet, thence south 28 feet, to the place of beginning; and also on that part of the same lot described as beginning 32 1/2 feet west from the southeast corner of said lot, running thence west 38 feet, thence north 98 1/3 feet, thence east 38 feet, thence south 98 1/3 feet, to the place of beginning; and also on a part of lot 12, block 8, Five-Acre Plat A, Big Field survey. That part of said lot 2 secondly described in said notice lies on the east side of said alley, while that portion firstly described in the notice lies on the west side. This last-mentioned portion was [*163] carved out of the heart of that portion of said lot 2 owned as aforesaid by plaintiff and his sister, and there was no means of ingress to or egress from this portion so carved out of the larger tract. That the marshal, by his return, dated July 25, 1891, certified that under said writ he had sold the property described in the notice to John Clark, and, deducting his commissions and expenses of sale, paid the balance realized upon said sale, viz., $ 962.36, to the attorneys of Clark, Eldredge [***11] & Co., and further returned that there was still due and unpaid on said judgment the sum of $ 886.90. (The John Clark mentioned in the return was a director and the principal stockholder of Clark, Eldredge & Co.)

On July 28, 1891, an alias execution issued from the said court in said action for the full sum of $ 1,673.36 and $ 30.50 costs, directed to said marshal, and thereafter the marshal made return thereon to said court that he had levied on all the right, title, claim, and interest of said plaintiff and his codefendants in said action in and to that certain parcel of land described as beginning 64 1/2 feet west of the northeast corner of said lot 2, running thence west 45 1/2 feet, thence south 20 rods, thence east 78 1/2 feet, thence north 90 3/4 feet, thence east 31 1/4 feet, thence north 41 1/4 feet, thence west 16 1/2 feet, thence north 148 1/2 feet, thence west 48 feet, thence north 49 1/2 feet, to the place of beginning; and certified by said return that he had sold all the premises last described to the said Frank B. Stephens and A. T. Schroeder for the sum of $ 828.70; and further certified that the judgment obtained by said corporation was still unsatisfied to the extent [***12] of $ 100. (The marshal's return was erroneous in this: that the true balance was less than $ 26.) On the 30th of September, 1891, said marshal made a further return to said last-mentioned writ, in which he certified that on September 30, 1891, he sold all of lot 12, block 8, Five-Acre [*164] Plat A, Big Field survey, situate in Salt Lake county, and also all that certain parcel of land described as beginning 39 feet east and 81 feet north of the southwest corner of said lot 2, running thence north 209 feet, thence east 16 1/2 feet, thence south 209 feet, thence west 16 1/2 feet, to the place of beginning, to said Frank B. Stephens and A. T. Schroeder, for the sum of $ 136; and that, deducting the costs and expenses of said last levy, amounting to $ 30, paid the balance, $ 106, to the attorneys of said Clark, Eldredge & Co., and returned said writ fully satisfied. All of that part of lot 2 firstly described in this statement, a plat of which appears in the record, constitutes a single parcel of land, and should be regarded and treated as such, and not as being divided into separate lots or parcels; and each and every parcel of said lot 2, block 70, plat A, so sold under said several [***13] writs of execution, was a part and portion of that part of said lot 2 which the said John M. Young derived title to under the will of John Young, deceased, as aforesaid.

It further appears that said Stephens furnished the marshal from time to time, with a description of the property to be levied upon and sold under said executions, and that the officer did levy and sell, from time to time, according to the descriptions furnished him by said Stephens. That the property so sold to said Clark was afterwards, and prior to the commencement of this action, conveyed by Clark by quitclaim deed to said Stephens & Shroeder, and that the same was bid in by said Stephens for said Clark. That the other portions of said lot 2, sold under said several executions, and said lot 12, were bid in at said sales by Stephens for himself and Shroeder, and that at none of said sales was there any other bidder than Stephens, nor was either of said sales attended by any person other than Stephens and the officer conducting the sales. At the time the last of these sales was made, to-wit, on 30th September [*165] 1891, the balance due Clark, Eldredge & Co. on said judgment amounted to $ 25.57, and no more, [***14] while the property of the plaintiff was sold for $ 136 at such sale, $

106 of which was by the marshal paid to Stephens & Schrooder, no part of which was ever accounted for to plaintiff It further appears that after said several sales had been made and before the time for redemption had expired, Stephens informed the plaintiff that the statutory time for redemption would not be insisted upon, that the plaintiff, believing and relying upon such promise and assurance, allowed the period for redemption to elapse without redeeming any of said property from said sales, and that marshal's deeds were given to the purchasers at said sales in pursuance of the statute in such cases made and provided It further appears that said lot 12 had been sold for taxes for the year 1890, and also for the year 1891 and that in the month of April, 1892, after Schroeder had obtained the marshal's deed for said lot 12, he was informed that the plaintiff was about to redeem said lot 12 from both of said [**254] tax sales, and that he well understood at the time that plaintiff was unaware of the fact that said lot 12 had been sold under execution, nevertheless he permitted the plaintiff to redeem said [***15] property from said tax sales, and purposely concealed from him the fact that said property had been so sold under execution, and that he and his partner. Stephens, then held the marshal's deed therefor

It further appears from the record that it was the design and purpose of Stephens & Schroeder at the outset to exhaust, if possible, all the property of plaintiff, of whatever nature or description, regardless of its value, under said several executions, and that they in fact accomplished that purpose Prior to the commencement of this action, plaintiff offered to pay to Stephens & Schroeder the full amount of the Clark, Eldredge & Co judgment, [*166] together with the interest thereon at the rate of 1 per cent per month, to compensate Stephens & Schroeder liberally for all services and trouble that they had rendered or been put to in the premises, to repay all or any advances which they, or either of them, might have made on account of the property, with interest thereon, and, in addition, to give them a bonus of $ 1,000 if they would reconvey said properties to plaintiff, which offer they declined and refused to accept Such, in brief, is the history of the transaction by [***16] which the plaintiff was stripped of all his possessions, and his property, worth at the time $ 26 000 or more, was taken to satisfy a judgment of about $ 1,700 An additional feature of the transaction is that Stephens & Schroeder were members of the bar. attorneys for the judgment creditors, who thus, under the forms of law and the processes of the court, sought to enrich themselves without any consideration for the rights of the judgment debtor, and who proceeded in disregard of the injustice and oppression to which he was thereby subjected

It is this transaction which appellants ask this court to approve We find ourselves unable to yield to the appeal We may say, with the supreme court of the United States in the case of *Byers* v *Surget, infra* "It seems pertinent here to inquire under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused or even palliated " It is insisted by appellants that mere inadequacy of price, however gross, will not authorize the courts to set aside a judicial sale The general rule undoubtedly is that mere inadequacy of price, alone, does not authorize the [***17] disturbance of such a sale, but we are not prepared to sanction the unqualified statement of the rule as put by appellants' counsel If the inadequacy is so gross as at once to shock the conscience of all fair and [*167] impartial minds, if the sacrifice is such that every honest man would hesitate to take advantage of it, it may well be doubted whether every such case would be beyond the power of a court of equity to relieve against

In *Byers* v *Surget* 19 How (U S), it is said on page 311 "To meet the objection made to the sale in this case, founded upon the inadequacy of the price for which the land was sold, it is insisted that the inadequacy of consideration simply cannot amount to proof of fraud This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, viz , unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation that, if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud " In the case of *Butler* v *Haskell*, 4 Desaus Eq 651, the chancellor says "I consider the result of the great body of the cases [***18] to be that, [HN1] wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and, in general, a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, weakness, or the distress or necessity of the vendor, and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of fairness of his conduct "

In *Graffam v Burgess, 117 U S 180, 6 S Ct 686, 29 L Ed 839*, the supreme court of the United States says "From the cases here cited we may draw the general conclusion that, [HN2] if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or party interested has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or [*168] the party injured will be permitted to redeem the property sold Great inadequacy requires only slight circumstances of unfairness in the [***19] conduct of the party benefited

by the sale to raise the presumption of fraud " All the cases unite in the doctrine that [HN3] on gross inadequacy of price, coupled with irregularities attending the sale, especially where such irregularities are not merely formal and technical, but such as have a direct tendency to prevent the realizing of a fair price for the property sold, and are attributable to the purchaser at the sale, it is the duty of the courts to set the sale aside, unless the complaining party is estopped by his own laches *Chamblee* v *Tarbox*, 84 Am Dec 614, *Howell* v *Baker*, 4 Johns Ch 118, *Nesbitt* v *Dallam*, 28 Am Dec 236, *Morris v Robey 73 Ill 462*, *Byers v Surget, 60 U S 303, 19 HOW 303, 15 L Ed 670*, *Graffam v Burgess, 117 U S 180 6 S Ct 686 29 L Ed 839*

This is not a case which rests on mere inadequacy of price alone, but one where the sales complained of were attended by such substantial irregularities as must have prevented a sale at a fair sum For instance, one of the parcels of said lot 2 levied upon and sold under the first execution, is described [**255] as beginning 101 feet north and 39 1/2 feet [***20] east of the southwest corner of said lot 2, thence east 15 1/2 feet, north 28 feet, west 15 1/2 feet, and south 28 feet to the beginning Reference to the plat in evidence shows that the property thus described is a portion of that part of lot 2 to which plaintiff and his sister derived title through the will of their deceased father, as before stated, and is included within the exterior boundaries of that portion thereof shown by the record to have been at that time leased to one Gebhardt The purchaser of the part thus levied on and sold by the marshal acquired a piece of land having no means of access to it It is needless to say that such a transaction must necessarily result in a sacrifice of the property Again, in the sales made under [*169] the several executions of portions of said lot 2 it appears that in each instance the levy was upon and the sale of all the plaintiff's right, title, and interest in a specific part of the portion of said lot 2 so owned by him and his sister, Lydia Y Merrill This is also an irregularity that renders the sale voidable, if not void, the necessary tendency of a sale under such a levy being to depreciate the value of the property sold

[***21] In Freeman on Cotenancy and Partition (section 216), under the heading of "Conveyance of Part under Execution," it is said "We have already seen that the decisions determining the effect of a conveyance made by a cotenant, and purporting to convey his interest in some specified parcel, are very inharmonious The reasons which exist in the case of a voluntary are somewhat different from those accompanying an involuntary conveyance [HN4] The purchase of the grantor's interest in a specified parcel is, in effect, a wager that such parcel will be set off to him on partition, or otherwise confirmed to him by the other cotenants Still, if such circumstances exist that the grantor sees fit to make, and the grantee to accept, a conveyance which may, in the event of an unfavorable partition, convey nothing, we can see no valid reason for denying the utmost effect to the deed which it can be given, consistently with the rights of the other cotenants But in the case of an involuntary transfer of property the interest of the person whose estate is to be divested by compulsion ought to be carefully considered and jealously guarded If an officer may lawfully levy on a specific parcel and subject [***22] it to forced sale, he may thereby sacrifice the property of the defendant, for few persons would be found willing to bid for that which, when purchased, consisted of a mere contingent interest,--an interest which the other cotenants were not bound to notice. and which might be finally lost upon a partition of the common property [*170] Hence the rule, supported by a decided preponderance of the authorities, is that the levy and sale of the debtor's interest in a specific part of the lands cannot be sustained " See also, *Starr v Leavitt, 2 Conn 243*, *Smith v Benson 9 Vt 138* and the cases cited in note to *Smith v Huntoon (Ill Sup), 134 Ill 24, 24 N E 971, 23 Am St Rep 651*

The rights of the cotenants of the judgment are not affected by the sale In proceedings instituted by them for partition of the common property they can ignore the same, and the result of the partition may be to deprive the purchaser at such judicial sale of that which he bid and paid for Such being the hazard which the purchaser must necessarily take, it is not reasonable to suppose that any one would bid a fair price for the property The wisdom of the rule announced [***23] in the cases just cited is exemplified by the facts of this case That part of lot 2 in controversy is but 94 1/2 feet in width east and west It is cut through the center from north to south by an alleyway. and the record discloses that it could be most equitably divided between the cotenants. the plaintiff and his sister, by allotting to one all of that part lying on the east, and to the other all that lying on the west, of the alley But it will be remembered that under the first execution issued on the Clark, Eldredge & Co judgment the marshal levied on and sold two parcels of said lot 2. one of which lies on the east side of the alley and the other near the center of that portion situate on the west side

Now, if Lydia Y Merrill, the cotenant of the plaintiff, or those claiming under her, should commence suit for partition, it would be found impracticable to make such a division of the property as she or they would be entitled to without ignoring one or the other of these sales The court called upon to make partition would be constrained to ignore such sales, or at least one of them Moreover, at the time the last sale was made under the executions [*171] mentioned, the [***24] balance remaining unpaid on the Clark, Eldredge & Co judgment

amounted to $ 25 57, and no more, yet the officer levied upon and sold property of Young to satisfy an alleged balance of $ 136, and, after deducting his fees, expenses, and commissions therefrom, paid the balance, $ 106, to Stephens & Schroeder, who retained the same ever after This was not an irregularity merely, such as would render the sale voidable, but, the levy and sale being excessive, the sale was absolutely void *Glidden* v *Chase*, 56 Am Dec 690 *Patterson* v *Carneal*, 13 Am Dec 208, *Hastings v Johnson, 1 Nev 613*

It will be observed that the purchasers at all the execution sales complained of except the first were the attorneys for the judgment creditor, that to the extent of furnishing the officer with the descriptions of the property to be levied on and sold by him under the executions, they directed and controlled the processes of the court, and directed and required the officer to levy upon and sell the property in such parcels as rendered it impossible to realize at the sales a fair price therefor [HN5] A purchase [**256] by an attorney for his own benefit at a sale over which [***25] he has exercised any direction or control should always be closely scrutinized by the court In *Jones* v *Martin*, 80 Am Dec 641, speaking of such purchases, the court says "Public policy and the analogies of the law require that they should be considered *per se* as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts " See *Howell* v *Baker*, 4 Johns Ch 117, *Byers v Surget, 60 U S 303, 19 HOW 303, 15 L Ed 670* And where, as in this case, the attorneys, who became purchasers, have so directed and controlled the officer charged with the duty of executing the writ as to lead to a sacrifice of the debtor's property, the court will not hesitate to grant relief

[*172] It is contended by the appellants that relief cannot be granted in this case, because the statutory period for redemption had expired before this suit was brought The cases are by no means rare where a court of equity has interfered to set aside a sale after the time for redemption has expired, such sale having been attended by irregularities, and having resulted in a gross sacrifice of the judgment [***26] debtor's property *Morris v Robey, 73 Ill 462*, *Blight's Heirs* v *Tobin*, 18 Am Dec 219, *Bullen v Dawson (Ill Sup), 139 Ill 633, 29 N E 1038*, *Graffam v Burgess, 117 U S 180, 6 S Ct 686, 29 L Ed 839* We may add that it appears from the record that the plaintiff was assured by Mr Stephens, before the period for redemption had expired, that the statutory period would not be insisted upon, and it comes with bad grace from the defendant now to urge that the plaintiff should be estopped by the fact that he relied upon that promise It is true that this assurance was given, not by defendant Schroeder, but by his partner, Stephens They, however, were acting in concert engaged in a joint venture, and all the acts and declarations of Stephens in connection with the sales and purchases in question were, under the circumstances disclosed by this record, binding upon the defendant Schroeder *Blight's Heirs* v *Tobin*, 18 Am Dec 219

We have made a careful examination of the record in connection with the numerous errors assigned on the part of the appellants, and have been unable to find any error which would call for a reversal of the decree [***27] of the court below The fact that there was a gross sacrifice of the judgment debtor's property at these sales is proved beyond controversy In the same manner it is established that these sales were attended by many and serious irregularities, for which the parties claiming through these sales were directly responsible Where such facts are clearly established by the evidence, and a decree is pronounced [*173] permitting redemption on an equitable basis, it will not be disturbed because of any technical errors in the trial of the case Let the order and decree appealed from be affirmed

MINER and SMITH, JJ , concur

Exhibit 2

SCHROEDER v. YOUNG.

No. 458.

SUPREME COURT OF THE UNITED STATES

161 U.S. 334; 16 S. Ct. 512; 40 L. Ed. 721; 1896 U.S. LEXIS 2167

Submitted January 9, 1896.
March 2, 1896, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

THIS was a complaint in the nature of a bill in equity, originally filed in the Third Judicial District Court of the Territory of Utah, by John M. Young against Frank E. Stephens and wife and Albert T. Schroeder and wife, as defendants, to set aside and cancel certain execution sales of real property in Salt Lake City as fraudulent and void, and for permission to redeem from such sales, notwithstanding the expiration of the statutory time for redemption, and for a decree compelling the defendants to convey to the plaintiff the property mentioned, upon just and equitable terms.

The material facts in the case were that, on March 6, 1891, Clark, Eldredge & Co., a corporation. obtained judgment by default in said court against the appellee John M. Young, Henry Goddard, and George Goddard in the sum of $1673.36, with $30.60 costs. Frank B. Stephens and Albert T. Schroeder, partners and the principal defendants, were the attorneys for Clark, Eldredge & Co. in such action. The plaintiff John M. Young was the owner of the undivided one half of two parcels of land in Salt Lake City, and plaintiff's sister, Lydia Y. Merrill, was the owner of the other undivided one half of the said parcels. Their title was derived from the will of their father, and, as to the greater part of such property, was subject to a right in Sarah Milton Young and Ann Olive Young to receive each one fourth of the money arising from said property during their respective lives.

On April 29, 1881, an execution was issued in said action of Clark, Eldredge & Co. against John M. Young, directing the marshal of the United States, if sufficient personal property could not be found to satisfy the judgment, to levy upon the real estate belonging to Young and his codefendants in such action; and on May 7, 1891, the marshal gave notice that he attached and levied on all the right, title, claim, and interest of the said John M. Young and his codefendants in and to that parcel of land described as beginning 101 feet north, and 39 1/2 feet east of the S.W. corner of lot 2, block 70, plat "A," Salt Lake City survey, and running thence east 15 1/2 feet, thence north 28 feet, thence west 15 1/2 feet, thence south 28 feet to the place of beginning; and also on that part of the same lot described as beginning 32 1/2 feet west from the S.E. corner of the said lot, running thence west 38 feet, thence north 98 1/3 feet, thence east 38 feet, thence south 98 1/3 feet to the place of beginning; and also on a part of lot 12, block 8, five acre plat "A," Big Field survey.

Afterwards, on July 25, 1891, the marshal certified that he had sold the property described in the notice to John Clark, and, deducting his commissions and expenses of sale, paid the balance realized upon said sale, viz., $962.36, to the attorneys of Clark, Eldredge & Co., and further returned that there was still due and unpaid on said judgment the sum of $886.90. The John Clark mentioned in the return was a director and the principal stockholder of Clark, Eldredge & Co. Afterwards, on July 28, an alias execution issued from the said court in such action for the full sum of $1673.36, and $30.50

costs, by virtue of which the marshal levied upon a certain other parcel of the same lot described as beginning 64 1/2 feet west of the N.E. corner of said lot 2, running thence west 45 1/2 feet, thence south 20 rods, thence east 78 1/2 feet, thence north 90 3/4 feet, thence east 31 1/4 feet, thence north 41 1/4 feet, thence west 16 1/2 feet, thence north 148 1/2 feet, thence west 48 feet, thence north 49 1/2 feet to the place of beginning; and on August 25 the marshal returned that he had sold these premises to the defendants Stephens and Schroeder for the sum of $828.70, and further certified that the judgment obtained by said corporation was still unsatisfied to the extent of $100.

On September 30, said marshal made a further return to the last mentioned writ, in which he certified that he sold all of lot 12, block 8, five acre plat "A," Big Field survey, situate in Salt Lake County, and also a certain parcel of land described as beginning 39 feet east and 81 feet north of the S.W. corner of said lot 2, running thence north 209 feet, thence east 16 1/2 feet, thence south 209 feet, thence west 16 1/2 feet to the place of beginning. to Stephens and Schroeder for the sum of $136, and that, deducting the costs and expenses of said last levy, amounting to $30, paid the balance, $106, to the attorneys of Clark, Eldredge & Co., and returned said writ fully satisfied.

The court found that all that part of lot 2 as described in this statement, a plat of which appeared in the record, constituted a single parcel of land, and should have been regarded and treated as such, and not as being divided into separate lots or parcels, and that the first parcel sold being 15 1/2 by 28 feet had no ingress or egress, and that the same as sold would necessarily be sacrificed on such sale on account of its location, but that at the time of the sale of this parcel, neither Stephens nor Schroeder had actual knowledge of any other realty owned by plaintiff.

The other material facts are stated in the opinion of the court.

Before the case was called for argument, the suit was settled so far as the defendants Stephens and his wife were concerned, leaving Schroeder and his wife sole defendants. The case coming on to be heard upon pleadings and proofs, the District Court made a decree permitting the plaintiff Young to redeem the property upon paying to the defendants the sum of $723.25, less certain costs, but subject to one half of a mortgage executed by the defendants, who were ordered to execute and deliver to plaintiff a deed of the property. From this decree an appeal was taken to the Supreme Court of the Territory, which affirmed the decree of the District Court, whereupon appellants prayed and were allowed an appeal to this court.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant attorney challenged a judgment of the Supreme Court of the Territory of Utah, which affirmed a decision setting aside execution sales as fraudulent and granting plaintiff debtor permission to redeem the property sold at execution.

OVERVIEW: A default judgment was entered against the debtor and the creditor's attorneys caused the marshal to make three separate sales of the debtor's land to them. The debtor brought suit against the attorneys seeking a decree setting the sales aside and permitting him to redeem the property. The trial court found that the marshal and attorney were the only ones present at the execution sales, that successive sales had produced lower prices, that one of the attorneys determined that a balance would be left on the judgment after each sale so that all of the debtor's land would be sold, and that the debtor had offered to pay the attorneys the full amount of the judgment and additional compensation but the offer was refused. One attorney settled before trial but the remaining attorney challenged the decree of redemption on the basis that it was entered after the expiration of the statutory redemption period. The court affirmed because the attorneys' inequitable conduct justified rescission of the execution sales and equity had jurisdiction to grant relief from fraud notwithstanding the expiration of the statutory period.

OUTCOME: The court affirmed the judgment setting aside the sales made to the attorney and granting the debtor permission to redeem the property.

CORE TERMS: redeem, purchaser, redemption, statutory period, bidder, deed, expired, levy, realized, marshal's, inadequacy of price, sale of property, judgment creditors, irregularity, sacrificed, assurance, ignorant, forms of law, judgment debtor, statutory time, reconveyance, thereunder, fraudulent, equitable, collector, attended, quantity, insisted, grossly, lulled

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution

[HN1] While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be

so gross as to shock the conscience If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized, if bidders have been kept away, if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner permitted to redeem

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
[HN2] If, in addition to inadequacy of price there be other circumstances throwing a shadow upon the fairness of the transaction, the judgment debtor will be allowed to redeem

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
Legal Ethics > Professional Conduct > Illegal Conduct
[HN3] Although there is no general rule that an attorney may not purchase at an execution sale, provided it be not done to the prejudice of his own clients, such purchase in itself is calculated to throw a doubt upon the fairness of the sale, and public policy and the analogies of law require that such purchases should be considered per se as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Contracts Law > Secured Transactions > Default > Foreclosure & Repossession > Redemption
[HN4] A purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security

LAWYERS' EDITION HEADNOTES:

When judicial sales may be canceled for fraud -- purchase by attorneys -- suit in equity to annul sale --

Headnote

1 Execution sales of real property, made for grossly inadequate prices, may be canceled where the property was purchased by one of the plaintiff's attorneys, and the sales were made in pursuance of a plan to obtain the property by successive sales of different parts thereof for the least possible sum, leaving a balance due after each sale so as to sell all the debtor's property, and the levies were made under specific directions of the attorney, who was the sole bidder at the sales and the only person present except the officer conducting the sales, especially where an offer to redeem the property by payment of more than was due has been refused

2 One of a firm of attorneys who has acquired an interest in the property under a purchase on execution sales, fraudulently made by his partner, cannot set up the title thereby acquired and at the same time repudiate his partner's acts in the acquisition thereof

3 The expiration of the statutory period for redemption from a sale of land under execution does not bar a suit in equity to annul the sale and a deed made thereon, because of the fraudulent conduct of plaintiff's attorneys, who purchased at the sale, where they lulled the debtor into false security by assurances of permission to redeem irrespective of the statute, although these were not in writing and were made without consideration

SYLLABUS

While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience

If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized, if bidders have been kept away, if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security, or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price the sale may be set aside, and the owner permitted to redeem

There are other facts in this case, stated in the opinion, in addition to the grossly inadequate price realized for the property, that afford ample justification for the action of the court below in permitting the plaintiff to redeem upon equitable terms, and ordering a reconveyance of the property

Quoere, whether issue of an alias for the original amount of the judgment, after the return of a prior execution, satisfied to the amount of nearly one half of such judgment, the sale of property thereunder to an amount more than sufficient to satisfy the amount actually due,

and payment of the excess to plaintiff's attorneys will not invalidate the entire proceedings?

Whether the levy upon the interest of a co-tenant in a specific part, designated by metes and bounds, of a certain larger quantity of land is valid, is not decided

Before the time had expired to redeem from the execution sale the plaintiff was told by the defendant that he would not be pushed, that the statutory time to redeem would not be insisted upon and, believing it, acted and relied upon such assurance Held, that under such circumstances the purchaser was estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, and that there was a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident or mistake, which might be exercised, notwithstanding the statutory period for redemption has expired

COUNSEL: Mr A T Schroeder and Mr James B Edmonds for appellants

Mr Parley L Williams for appellee

OPINION BY: BROWN

OPINION

[*337] [**513] [***724] MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court

Plaintiff relies mainly for a decree in this case upon the fact that his interest in the property in question, which the trial court found to be worth $ 26,000, was sacrificed at these several judicial sales to pay a judgment of little more than $ 1700

[HN1] While mere inadequacy of price has rarely been held sufficient [*338] in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized, if bidders have been kept away, if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security, or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a [**514] greatly inadequate price, the sale may be set aside, and the owner permitted to redeem

Thus, in *Byers v Surget 19 How 303, 306*, lands to the amount of 14,000 acres, and estimated at from $ 40,000 to $ 70,000 in value, were sold by the sheriff in satisfaction of a judgment for costs of $ 39, to the attorney for the successful party, and conveyed to him for $ 9 31 1/2 The sale was pronounced to have been fraudulent and void, and a reconveyance of the property was decreed It appeared that the owner of the property had no knowledge of the suit until he was informed of the sale of the land, that the attorney for the successful party, the defendant, assumed himself the power to tax the costs, the right of selecting the final process, of prescribing the description and quantity of the property which he chose to have seized in satisfaction of directing the sheriff as to the various steps to be taken by him and of becoming the purchaser himself for the petty sum of $ 9 31 1/2 Of this proceeding, Mr Justice Daniel, in delivering the opinion of the court, remarks "Such is the history of a transaction which the appellant asks of this court to sanction, and it seems pertinent here to inquire under what system of civilpolity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused, or even palliated "

In *Graffam v Burgess 117 U S 180, 186*, two judgment [*339] creditors became the purchasers for about $ 150 of unincumbered property worth at least $ 10,000, although the judgment debtor had $ 3000 worth of furniture and personal property in the house subject to levy During the temporary absence of the complainant, the defendants entered upon the premises, broke into the house and took possession of it on behalf of the purchasers, removed the furniture and other personal property, including the wearing apparel of the complainant, took possession of her personal correspondence and papers and the sum of $ 170 in money, and still retained possession of the property at the time of the filing of the bill The court found that the complainant was ignorant of the issue of the execution or of the sale of the property, that the purchasers knew that she was unconscious of it, and endeavoured to keep her so, and took an inequitable [***725] advantage of her ignorance to get possession of it In reply to the argument that the proceedings were regular, Mr Justice Bradley observed "It is insisted that the proceedings were all conducted according to the forms of law Very likely Some of the most atrocious frauds are committed in that way Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law " The court commented most severely upon the conduct of the purchasers, and found no difficulty in setting aside the sale, although four members of the court dissented upon the ground that the complainant had failed in her duty to redeem from the sale within the time limited by law

In Howell v. Baker, 4 Johns. Ch. 118, a farm worth $ 2000 was sold under a judgment and execution, on which not more than $ 80 were due, to the attorney of the plaintiff, who attended the sheriff's sale, for $ 10. The sale was held upon a stormy day, when no person but the attorney and the deputy sheriff were present, and it was held that these facts, connected with the gross inadequacy of price, were sufficient to authorize the purchaser to be held as trustee for the respective interests of the parties to the execution, and the bidder was allowed to redeem on equitable terms. A large number of other cases are also cited by Mr. Justice Bradley in his **[*340]** opinion in Graffam v. Burgess, and the general proposition laid down, as above stated, that [HN2] if, in addition to inadequacy of price there be other circumstances throwing a shadow upon the fairness of the transaction, the judgment debtor will be allowed to redeem.

There are other facts in this case than the grossly inadequate price realized for this property, that afford ample justification for the action of the court below in permitting the plaintiff to redeem upon equitable terms, and ordering a reconveyance of the property.

1. The property was sold to Stephens and Schroeder, who had acted as attorneys for the judgment creditor throughout the entire transaction, and had been fully paid by the corporation for their services. In this connection the trial court further found that Stephens furnished the officer a description of the property to be levied upon and sold, and that he accordingly did levy upon and sell as he was directed by Stephens according to such description. Add to this the further finding that at neither of the sales was there any other bidder and no other person present than Stephens and the officer conducting the sales, and we can readily appreciate how inevitable it was that the property should be sacrificed. [HN3] Although there is no general rule that an attorney may not purchase at an execution sale, provided it be not done to the prejudice of his own clients, *Pacific Railroad v. Ketchum, 101 U.S. 289, 300*, such purchase in itself is calculated to throw a doubt upon the fairness of the sale, and as is quaintly said of such sales by the Court of Appeals of Kentucky in *Howell v. McCreery, 7 Dana, 388*: "Public policy and the analogies of law require that they should be considered per se as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts." See also Hall v. Hallet, 1 Cox, 134; *Jones v. Martin, 26 Texas, 57*; *Byers v. Surget, 19 How. 303*; *Blight's Heirs v. Tobin, 7 T.B. Mon. 612*.

2. The alias execution of July 28 was not only issued for the full amount of the original judgment, $ 1673.36 and $ 30.50 costs, without **[**515]** deducting $ 962.36, realized upon the first execution, **[*341]** but under it the marshal sold, under the directions of Stephens and Schroeder, property for an amount in excess of the amount remaining unpaid on the judgment, and collected the excess and paid it over to Stephens and Schroeder, who retained it. In this connection the trial court made the following finding: "At the time of the last sale, to wit, September 30, 1891, there was a balance due Clark, Eldredge & Co. of only $ 25.57, and their judgment had been satisfied except said sum, and to satisfy said balance property was sold as aforesaid, amounting in all to $ 136, $ 106 of which was paid by the United States marshal to said Stephens and Schroeder." Upon the theory were the judgment creditors entitled to any more than the amount of their claim, and if, as may sometimes happen, the property be sold for more than the amount of the execution, the residue should be returned to the judgment debtor.

There is reason for saying that the issue of an alias execution for the original amount of the judgment, after the return of a prior execution, satisfied to the amount of nearly one half of such judgment, the sale of property thereunder to an amount more than sufficient to satisfy the amount actually due, and the payment of the excess to the plaintiff's attorneys, invalidate the entire proceedings -- the rule in some States being that a levy for an amount exceeding the amount of the judgment or the amount actually due upon the judgment with interest and costs is void. 2 Freeman on Executions, § 381; *Glidden v. Chase, 35 Maine, 90*; Pickett v. Breckinridge, 22 Pick. 297; *Peck v. Tiffany, 2 N.Y. 451*; *Hastings v. Johnson, 1 Nevada, 613*; *Patterson v. Carneal, 3 A. K. Marsh. 618*. But, however this may be, there can be no doubt that this alias execution and the proceedings thereunder were irregular so far as Stephens and Schroeder were concerned, though perhaps not to the extent of invalidating the title of a bona fide purchaser. *Stead's Executors v. Course, 4 Cranch, 403*; *French v. Edwards, 13 Wall. 506*; *Groff v. Jones, 6 Wend. 522*; Tiernan v. Wilson, 6 Johns. Ch. 411.

3. The court below was also of opinion that the property of the debtor was sacrificed by the manner in which the sales **[*342]** were made, and particularly by the successive sales of his interest in different parts of lot 2, block 70, held in common with his sister, Lydia Y. Merrill, and that a proper regard for his interests required that his entire right to the whole land thus held in common should have been sold at one time. This, however, raises a question as to which the authorities are not entirely in harmony, viz., whether the levy upon the interest of a co-tenant in a specific part, designated by metes and bounds, of a certain larger quantity of land is valid. In view of the other **[***726]** manifest irregularities, we do not feel called upon to express an opinion upon this point.

There is one finding, however, in respect to these sales, which, taken in connection with the facts that the defendants were the attorneys for the judgment creditors, furnished the officer selling the property with the description of the property to be levied upon and sold, and became the purchasers of the property either directly from the marshal, or indirectly through their client Clark, which is in itself sufficient to justify the action of the court below in vacating the sales and permitting the plaintiff to redeem, viz., that "before any of said property was sold, said Stephens, who was the sole bidder at each of said sales, formed the intention that, regardless of the value of the various pieces of property to be sold, and that were sold, he would leave a balance after each sale, so that all of the plaintiff's property would be sold, and he so bid at the various sales as to accomplish, and did accomplish, said object and purpose." As Stephens was appellant's partner in the practice of law, and in the prosecution of the claim of Clark, Eldredge & Co., and bought the property in for himself and partner, who now sets up title in himself by virtue of such purchase, it is clear that he is bound by Stephens' acts and representations. Certainly he cannot set up a title acquired by Stephens' assistance, and at the same time repudiate his acts in connection with the acquisition of such title.

There are other circumstances, also, found by the court below, which, taken in connection with the grossly inadequate price paid, render it still more inequitable that purchasers standing in the position of the defendants in this case **[*343]** should insist upon the letter of the bargain, and throw something more than a mere doubt upon the fairness of the transaction. Before the time had expired for redemption Stephens and Schroeder requested the collector of taxes of that county to allow them to bring suit against the plaintiff to recover the taxes owing by him for the year 1890, on the part of lot 2 described in the complaint, and agreed that, if the collector so consented, they would bring the suit, and make the collection free of cost to the collector, an arrangement which was carried out according to its terms. On April 10, 1892, plaintiff offered to pay defendants the full amount of the judgment obtained by them, together with interest at the rate of one per cent per month, and also to liberally compensate them for all their services and trouble, give them $ 1000 besides as a bonus, and pay all their advances with interest if they would reconvey to him, which the defendants refused to do. Of a similar offer and refusal this court in *19 How. 310, 311*, speaking through Mr. Justice Daniel, said: "Another pregnant proof of the design of the appellant to grasp and retain what no principle of liberality or equity could warrant, is the fact, clearly established, of his refusal after the sale to accept from the appellee, for the redemption of his lands so glaringly sacrificed, a sum of money considerably exceeding in amount the judgment for costs, with all the **[**516]** expenses incidental to the carrying that judgment into effect. The appellant, by his irregular and unconscientious contrivances, achieved what he conceived to be an immense speculation, and he determined to avail himself of it, regardless of its injustice and ruinous consequences to the appellee."

About the same time, the plaintiff, being ignorant of the fact that lot 12 had been sold and that the defendants had a deed therefor, informed the defendant Schroeder that he intended to redeem the lot from a sale that had been made for the taxes of 1891, and afterwards did so redeem said lot, and informed Schroeder that it had been done, the plaintiff being still ignorant that the defendants held a marshal's deed for it. Again, on April 24, plaintiff being still ignorant that defendants held a marshal's deed for lot 12, informed Schroeder **[*344]** that he intended to redeem said lot from a tax sale that had been made thereof for the taxes of 1890, and did subsequently redeem the same, and informed Schroeder of the fact, and that Schroeder never at any time informed him that he had obtained a deed for the lot. The court further found that defendants purposely and intentionally failed to inform the plaintiff that had a title to the said lot at the time the plaintiff was redeeming the same from the tax sales. The court further found that the said attorneys, in violation of their duty to obtain the highest possible price for the property while acting in behalf of their clients, became the bidders upon said property, and so acted as to obtain the same for the least possible sum, so as to satisfy the judgment, and at the same time to sell all the property belonging to said Young. If these facts be not sufficient to justify a rescission of these sales, it is difficult to imagine what would be so considered.

4. Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the [HN4] purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security. Guinn v. Locke, 1 Head, 110; *Combs v. Little, 4 N.J. Eq. 310*: *Griffin v. Coffey, 9 B Mon 452*; *Martin v. Martin, 16 B. Mon. 8*; *Butt v. Butt, 91 Indiana, 305*; Turner v. King, 2 Ired. Eq. 132; *Lucas v Nichols, 66 Illinois, 41*; *McMakin v Schenck, 98 Indiana, 264*. In *Southard v. Pope's Ex'rs, 9 B Mon. 261, 264*, it is said that "a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed

would be a fraud upon the defendant in execution, and authorize an application by him to a court of equity for relief "

[*345] Probably, if a motion had been made in the original case to set aside the sale upon the ground of mere irregularities, such motion would have to be made before the statutory period for redemption had passed, but in this class of cases, where fraudulent conduct is imputed to the parties conducting the sale, there [***727] is a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident or mistake, which may be exercised, notwithstanding the statutory period for redemption has expired. It is evident that, where a sale has culminated in the execution and delivery of a deed to the purchaser, which is not void upon its face, or a mortgage has been put upon the property, as in this case, no remedy is complete, which does not go to the cancellation of such deed, and the complete reinvestment of the title in the plaintiff It also appears from the findings that appellant has received rents from the property, that various sums had been expended for taxes and other purposes, that an accounting was necessary in adjusting the rights of the parties, which could not be effectually carried on in a court of law There can be no doubt of the jurisdiction of a court of equity in such case notwithstanding the expiration of the statutory time of redemption *Graffam v Burgess, 117 U S 180*, *Blight's Heirs v Tobin, 7 T B Mon 612*, Day v Graham, 1 Gilman. (6 Ill) 435, *Morris v Robey, 73 Illinois, 462*, *Fergus v Woodworth, 44 Illinois, 374*, *Bullen v Dawson, 139 Illinois, 633*, *Jenkins v Merriweather, 109 Illinois, 647*, *State Bank v Noland, 13 Arkansas, 299*

The appellant's brief deals largely with criticisms upon the findings and upon the admission of testimony, which we do not feel it necessary to discuss, as they do not involve the merits of the case, which rest upon the undisputed facts It would be a reproach to a court of equity, if it could not lay hold of such a transaction as this is shown to be, and set aside a sale of property acquired under the forms of law and in defiance of natural justice

The decree of the court below is, therefore,

Affirmed

Exhibit 3

ORIGINAL

IN THE SIXTH JUDICIAL DISTRICT MANTI COURT

IN AND FOR SANPETE COUNTY, STATE OF UTAH

DAVID PIPER, Plaintiff, VS. JUSTIN C. BOND, ALISON D. BOND, and DALE M. DORIUS, Defendants.	CASE NO. 07600191 MI BENCH TRIAL

BEFORE THE HONORABLE DAVID L. MOWER

SIXTH JUDICIAL DISTRICT MANTI COURT

SANPETE COUNTY COURTHOUSE

MANTI, UTAH 84642

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 23, 2008

TRANSCRIBED BY: Joseph M. Liddell, CSR, RPR

20080906-CA

contact Mr. Pyper.

Q. (BY MR. QUESENBERRY): Correct. Correct

THE WITNESS: I -- I don't recall exactly how that, ah, contact come about.

Q. Do you recall seeing him in person?

A. I may have.

Q. Okay.

A. I'm not sure.

Q. What do you recall during that first communication?

A. Ah, I don't recall exactly what transpired. I think he expressed his frustration and wanted information on how to redeem the property prior to the expiration of the redemption period.

Q. And how did you respond?

A. I told him that he needed to contact the plaintiff's attorney in the action and get a payoff or find out what he needed to do to redeem it.

Q. How did he specifically express frustration to you?

THE COURT: You're asking him to repeat what Mr. Pyper said; right?

MR. QUESENBERRY: Correct, Your Honor.

THE COURT: Can you do that?

THE WITNESS: I can't pervade and I -- I --

Q. (BY MR. QUESENBERRY): Did you recall any emotions or any other indications, ah, giving you this idea of

frustration?

THE WITNESS: Well, he -- he was anxious to get it redeemed, you know. And I -- I -- beyond that, I don't know. I don't recall.

Q. Do you have any other recollection, ah, in any of the three communications that you had with Mr. Pyper?

A. Well, I remember a phone call conversation, and it was -- the phone call was made from I believe it was D-Land Title and it -- it was shortly before the redemption period expired. Only days. And -- and he, ah, expressed concern that they were unable to get a payoff so that they could redeem the property.

Q. Do you remember, was that a conference call from D-Land Title? Or was it just you --

A. No. As I recall, --

Q. -- and he?

A. - ah, Mr. Pyper was at D-Land Title.

Q. Okay.

Do you remember anything else of that conversation, that phone conversation from D-Land?

A. I don't recall.

Q. But you -- you do recall that being prior to the ex-- ah, expiration of did you say the redemption period?

A. Redemption period. Yes, it was.

Q. Do you have any other recollections of the three

objection's overruled and Exhibit No. 3 is received. That's an appraisal.

(Plaintiff's Exhibit No. 3 was received into evidence.)

FURTHER DIRECT EXAMINATION

BY MR. QUESENBERRY:

Q. Mr. Pyper, ah, would you turn to the second page.

THE COURT: Well, it says what it says. I don't need a witness to read it to me.

Q. (BY MR. QUESENBERRY): Okay.

Mr. Pyper, is the property -- ah, was it encumbered with anything during that 6-month, ah, redemption period?

THE WITNESS: Yes.

Q. What was it encumbered with?

A. Ah, Justin Bond had a couple of liens on it. Ah, there was four or five different -- different liens.

Q. Were you able to clear title?

A. Yes. Everything, except for, ah, Justin Bond.

Q. His judgment, which is at issue here today?

A. Correct.

Q. Now, there was talk about a, ah -- a large bank lien against the property. Do you know what that was about?

A. That was part of the original mortgage when I built the house back in '96, and it was paid down to 30 -- about $38,000. Then we, ah, settled with the bank.

Q. Has that deed been reconveyed off of title?

A. Yes.

MR. QUESENBERRY: Your Honor, if I may approach.

THE COURT: Go ahead.

Q. (BY MR. QUESENBERRY): Do you recognize that document (Indicated)?

THE WITNESS: Yes.

Q. And what is it?

THE COURT: Does it have an exhibit number on it?

MR. QUESENBERRY: I believe -- No. 4, Your Honor.

THE COURT: I'm asking the witness.

THE WITNESS: Exhibit -- yes. No. 4.

THE COURT: Thank you.

And the question was do you recognize?

THE WITNESS: Yes.

Q. (BY MR. QUESENBERRY): And what is it

THE WITNESS: Ah, the deed of reconveyance from Wells Fargo Bank.

Q. That you received from Wells -- Wells Fargo?

A. Yes.

MR. QUESENBERRY: Your Honor, I'd move that this exhibit be admitted as evidence.

THE COURT: Mz. Reyes? (No verbal response.)

Have you seen the exhibit, Mz. Reyes?

MZ. REYES: Your Honor, if I could just voir dire Mr. Pyper on this issue quickly.

THE COURT: Oh.

MZ. REYES: I'm not asking him to disclose. I'm just asking him if anyone assisted him in it.

THE COURT: Overruled. Go ahead and answer.

THE WITNESS: Ah, yes.

Q. (BY MZ. REYES): And who was that?

THE WITNESS: Ah, my attorney Bryan Quesenberry.

Q. That's the same person that's here with you today; is that true?

A. Yes.

Q. Okay.

And -- and when was this deed of reconveyance executed?

A. You mean when did I --

Q. Well, when is it signed? What is it dated?

A. Ah, this is dated the 23rd day of April, 2007.

Q. So on -- on November 9th during -- at the time of the sheriff's sale the, ah trust deed would have still been against the property at that time; correct?

A. Yes.

MZ. REYES: Okay.

THE COURT: Back to you, Mr. Quesenberry. You're still -- you're offering No. 4?

MR. QUESENBERRY: Ah, yes, and I -- ah, that's right. She wanted to voir dire. And yes, I'm still offering

it.

THE COURT: What about No. 4? Should I receive it?

MZ. REYES: It's fine.

THE COURT: Received.

(PLAINTIFF'S EXHIBIT NO. 4 was received into evidence.)

Next question, Mr. Quesenberry.

FURTHER DIRECT EXAMINATION

BY MR. QUESENBERRY:

Q. What did you plan to do about the property after the sheriff's sale, November of '06?

A. Ah, to fix it up so it was that we could get the appraisal for the bank. We started right away qualifying for the bank loan and, ah, then to --

THE COURT: I think I'm getting more than I wanted here. The question's "What were you gonna do?" And he said, "I was gonna fix it up." So let's go on to the next question.

Q. (BY MR. QUESENBERRY): Okay.

Did you apply for a bank loan?

THE WITNESS: Yes.

Q. And with what bank? Do you recall?

A. I can't recall the name of the bank. Ah, it was done through, ah, Mike and Chris right here in -- in Ephraim.

Q. That's fine. That -- that's not important.

Did you do that within, ah, 180 days after?

A. Yes.

Q. Were you able to, ah -- to redeem the property from the sheriff's sale within that 180 days.

A. No.

Q. Why not?

A. I could not get a payoff that the bank requested, ah, from Dorius/Bond.

Q. Okay.

What efforts did you make to obtain that payoff amount?

A. I made several phone calls.

Q. Now, are you looking at an exhibit?

A. Yes.

Q. I believe we already admitted Exhibit No. 1, which is a copy of your notes. Do you have that in front of you?

A. Yes.

Q. And do you have the original, as well, in front of you?

A. Yes.

MR. QUESENBERRY: Your Honor, I would like to walk through this with him --

THE COURT: Ask your questions. See if there's an objection.

MR. QUESENBERRY: -- if the Court is, ah, would indulge me.

MZ. REYES: Your Honor, I would object that I think

his hand. (Inaudible). Okay.

Ah, Your Honor, you would have -- prefer that he look at the one with the, ah, the exhibit tag on it -- (Inaudible) -- courtesy copy?

THE COURT: No. I'd prefer that he give his recollection about what happened.

MR. QUESENBERRY: Okay.

THE COURT: I think that's what a witness is required to do. I think he probably ought to turn the paper over and see what his recollection is.

Q. (BY MR. QUESENBERRY): Okay. Flip it over.

Do you recall when you first began making phone calls to Mr. Dorius's office.

A. Yes.

Q. About when was that?

A. Ah, April 20th, after I received a phone call from you, stating the bank had reconveyed --

Q. Oh. Okay. Don't --

A. Okay.

Q. I don't want to hear my conversation with you.

Did you take notes of these phone calls?

A. Yes.

Q. That series of phone calls.

Did you -- how did you take them? How did you specifically take these notes?

A. Ah, each and every time I called them I had a tablet with me and I wrote the time, the date, and basically what was discussed.

Q. Within how -- (Inaudible) -- the period of time from when you hung up the phone to when you wrote these down?

A. Within a minute, two minutes. Sometimes right as soon as I hung up.

Q. So you began on -- on Friday the 20th. Was that Mr. Dorius or Mr. Bond? Do you recall who you called?

A. I was trying to reach Mr. Dorius.

Q. And were you successful reaching him, initially?

A. On the first call, no. On the second call, what was on the 25th of April, ah, I spoke with Mr. Dorius.

Q. Did you speak with him any other time, other than that April the 25th phone call?

A. I think we spoke one more time, but it was way further down the line.

Q. So the April 25th phone call you spoke with him. What do you recall by the conversation with him?

A. Ah, I called him and told him that I needed the, ah, payoff for the judgment and liens that were on the property because I had the bank loan in place and I also had another source of money to pay him and, ah --

Q. How did -- how did he respond to that?

A. He asked me, as I recall, something, "What do you

think would be fair on this?" And I offered -- I said, "Fair, to me, would be about $8,500. But I need the full payoff on your letterhead, signed by you, and sent to D-Land Title so that this bank loan can be closed."

Everything was ready to go except for the -- for Mr. Dorius or Mr. Bond.

Q. And how did he respond to that?

A. Ah, said that he would get into the file and he would get back to me later; that he had to speak with, ah, Mr. Bond and then he would get back to me.

Q. When did you call his office next? Do you recall?

A. Ah, it started on the, ah, 25th and I called every day, except the weekends. So the 23rd, probably the 24th.

Q. Well, so far you've talked about the 20th --

A. 20th.

Q. -- and then the 25th --

A. 25th.

Q. -- when you actually had the conversation with him. So after the 25th?

A. I called him on the 25th because I got the reconveyance from the bank in my hand. So then I -- that was cleared, so that's the -- when I spoke with him.

Q. About how many times do you recall calling his office, after this -- this initial phone call with him?

A. Over 28 times. And I called their number in, ah,

maybe it's a different --

MR. QUESENBERRY: The conversation with him.

THE COURT: You're asking him for a date.

MR. QUESENBERRY: Correct. If he recalls when he first spoke with Mr. Bond.

THE WITNESS: Ah, looks like the, ah, 10th of May.

Q. (BY MR. QUESENBERRY): And what did you tell Mr. Bond?

A. Ah, the discussion I had with, ah, Mr. Dorius, ah, that I needed the payoff; that I had the bank loan plus I had other sources of money to pay them off. And I also asked him who was in charge -- who I need to get this from who was in charge of this lien.

It was in his name, but Mr. Dorius owned it or something because he worked for him. And Mr. Bond told me that Mr. Dorius was in charge of the -- of the loan so.

Q. Did he indicate what a payoff amount would be?

A. No.

Q. How did you end the conversation with him?

A. Just that they would get together, Mr. Dorius and Mr. Bond, and figure out the payoff, and they would get back to me. Mr. Bond said he'd call me back.

Q. Did Mr. Bond tell you, in that conversation, he would call you back?

A. Yes.

Q. And during that time span and those phone calls to her, did she ever tell you, ah, that Mr. Dorius doesn't want to talk to you.

A. No.

Q. Did she ever tell you that they would not get you a payoff amount?

A. No.

Q. Did she ever tell you to stop calling?

A. No.

Q. Did Mr. Bond, at any time, tell you, "Stop calling me."

A. No.

Q. Did he, at any time, tell you, "I'm not giving you a payoff amount."

A. No.

Q. "Leave me alone."

A. No.

Q. How about Mr. Dorius? Did he, at any time, tell you, "Leave me alone --" --

A. No.

Q. -- or "Stop calling," or "I'm not gonna get you anything."

A. No.

Q. Now I think you testified about your conversations with Mr. Dorius. You've mentioned one, early on, April 20th.

Was there another conversation that you had with Mr. Dorius?

A. Yes. I believe we had a second one, ah, two to three days after the first one. And he said he was having trouble getting a hold of Mr. Bond and that he would do so and then get back with me.

Q. Did he say what he'd get back with you about or what information he'd get you?

A. With the payoff that I'd been asking for.

Q. Did he give you any indication that he would not provide you the information you've requested?

A. No.

Q. How about after that?

A. That --

Q. Did he call you -- or you talked with him at any time after that second conversation?

A. Just the two times that I recollect. The rest of 'em is just trying to get a hold of him.

Q. Did you expect, during this time of questions --

MZ. REYES: I'm gonna object as to leading.

THE COURT: Well, what he expected doesn't make any difference either, so sustained. Go on to another question.

Q. (BY MR. QUESENBERRY): Did you ever get a -- get a payoff amount from either Mr. Bond or Mr. Dorius or someone from their office?

THE WITNESS: No.

It's still a good argument. I don't mean to say your argument's not worthwhile, but, ah, it doesn't change my mind about receiving the document.

Okay. Other questions?

MR. QUESENBERRY: Go ahead.

THE COURT: Cross examination, Mz. Reyes.

CROSS EXAMINATION

BY MZ. REYES:

Q. Mr. Pyper, you indicate that, ah, you had a bank loan in place. That -- that was your testimony; correct? That you had a bank loan in place.

A. My son.

Q. Okay.

So you've never had a bank loan in place. You've never had funds available or any proof. Okay. Well, then let me just ask you this. This appraisal, this was done for Ryan T. Pyper. Who is Ryan T. Pyper?

A. My son.

Q. You testified earlier that you had a bank loan in place. You just needed a payoff. That's not true; right?

A. No. He had the bank loan in place.

Q. He had the bank loan. Okay.

A. I did all the paperwork and got everything for him and set it up. But it was in his name. He was buying the house.

met. You called him to make an offer of settlement.

A. No. I called him to get the payoff. During this discussion he, ah, asked me what I thought was fair and I says $85 -- $8,500 would be more than fair to me, ah, for what was done. Then he said something like, "Well, you've really ruffled --" --

Q. Okay. You don't -- you don't need to -- you don't need to respond. I just need you to answer my questions, please.

So isn't it true that you also indicated to Mr. Dorius that you would have to have the lien released off of the home in order for you to come up with the $8,500 that you were offering at that time?

A. For the bank loan, ah, yes. I needed a written statement from him for the payment -- total payment, releasing everything, before the bank would give money. But I had another source of money, ah, cash.

Q. So at that time you didn't actually have -- at that time you didn't actually have the ability to pay $8,500 unless they were willing to release the lien; isn't that true?

A. At that time I had the ability to pay the full amount, whatever that may have been.

Q. Why did you make no effort to attempt to tender into -- I'm sorry -- to provide that money to Mr. Dorius' office?

A. No one would ever tell me what I owed.

Q. But you knew what you owed. You indicated that under the Writ of Execution you knew you owed him approximately -- your testimony was approximately 13,000, but you made no efforts whatsoever to provide any moneys; isn't that true?

A. No. Not until they would give me, ah the payoff with interest or whatever else was gonna be added on there so that the title would be clear. Whatever they would have told me, I had the money at that time to pay them off.

Q. Subject to them releasing the lien on the property. That's the only way you could get the money.

A. No. I had the cash to pay them the full amount of whatever they may have come up with up to $18,000. Ah, I had the cash at that time to pay them, --

Q. Any --

A. -- but I needed the note from them to get my loan from the bank afterwards --

Q. At this time you knew that --

A. -- to release it.

Q. -- your time to redeem the property was running; correct?

A. Yes.

Q. You knew about the sheriff's sale that took place on November 9th.

Q. (BY MZ. REYES): Since the time of the sheriff's sale on November 9th of 2006, has someone been living in the home?

THE WITNESS: Yes.

Q. And who was that person?

A. My son.

Q. And is -- is he paying to reside in the home?

A. He's done payment by, ah, we've put a new roof on, all new soffit and facial, redone bathrooms, ah, poured cement.

Q. When were all these things done?

A. Ah, from November -- well, over the last year and, ah, before the appraisal.

Q. So this appraisal takes into account improvements on the property --

A. Yes.

Q. -- that weren't there at the time of the sheriff's sale in November of '06.

A. Right.

Q. Okay.

A. The appraiser came out and told us before he could appraise it that he needed certain things done for the bank for him to appraise this property. So we done them things.

Q. Was -- was the home, at that time when you said this appraiser contacted you, was that some time before November or in November? (No verbal response.)